

1 Jason S. Varnado (State Bar No. 211067)  
jvarnado@jonesday.com  
2 JONES DAY  
717 Texas, Suite 3300  
3 Houston, TX 77002-2712  
Telephone: +1-832-239-3939  
4 Facsimile: +1-832-239-3600  
5 Neal J. Stephens (State Bar No. 152071)  
nstephens@jonesday.com  
6 Vincent Doctor (State Bar No. 319408)  
vdoctor@jonesday.com  
7 JONES DAY  
Silicon Valley Office  
8 1755 Embarcadero Road  
Palo Alto, CA 94303  
9 Telephone: +1-650-739-3939  
Facsimile: +1-650-739-3900

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11 Attorneys for Defendant  
ROBERT T. BROCKMAN

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,  
16 Plaintiff,  
17 v.  
18 ROBERT T. BROCKMAN,  
19 Defendant.

Case No. 3:20-cr-00371-WHA

DEFENDANT ROBERT T. BROCKMAN'S  
REPLY IN SUPPORT OF MOTION FOR A  
HEARING TO DETERMINE WHETHER  
MR. BROCKMAN IS COMPETENT TO  
ASSIST IN HIS DEFENSE

Date: January 12, 2021  
Time: 2 p.m.  
Judge: Hon. William Alsup  
Place: Courtroom 12

22 DEFENDANT ROBERT T. BROCKMAN'S REPLY IN SUPPORT OF  
23 MOTION FOR A HEARING TO DETERMINE WHETHER MR. BROCKMAN  
IS COMPETENT TO ASSIST IN HIS DEFENSE

24 I. THE GOVERNMENT HAS CONCEDED THAT THE MOTION SHOULD BE  
25 GRANTED

26 The government has conceded the sole issue raised on the defense's motion: pursuant to  
27 18 U.S.C. § 4241(a), Mr. Brockman must be accorded a hearing to determine whether he is  
28 competent to assist in his own defense. Gov't Resp. at 1 (the "Response"), ECF No. 69; *see also*

1 Gov't Resp. at 2 ("As the Motion explained, the threshold for holding a competency hearing is  
 2 low, and it is satisfied in this case.").

3       The government could have saved this Court's and the defense's time by agreeing to the  
 4 hearing without a contested motion, and then turning to the next steps as to how the hearing  
 5 should proceed. Now that the government has abandoned its indefensible position that no  
 6 competency proceedings should be conducted in this case, the defense has asked the prosecutors  
 7 to meet and confer over appropriate, reciprocal discovery of evidence relevant to competency and  
 8 proposed for admission at a hearing, the sequence and timing of further examinations of  
 9 Mr. Brockman, a proposed schedule for the actual competency hearing and other proceedings,  
 10 and any other issues relevant to competency proceedings.

11 **II. AN INDEPENDENT EXAMINATION OF MR. BROCKMAN MUST TAKE  
 12 PLACE IN A NON-CUSTODIAL SETTING**

13       It would appear that the only remaining open issue, apart from scheduling, is the manner  
 14 in which an examination of Mr. Brockman should take place.

15       The government had unhindered access to Mr. Brockman's medical records, and could  
 16 have had an independent medical examination conducted, during a nearly six-month period prior  
 17 to the Indictment: In early April 2020, defense counsel provided medical reports and letters from  
 18 Mr. Brockman's four diagnostic and treating doctors, setting out their medical conclusion that  
 19 Mr. Brockman lacks the ability to assist in his defense, along with the results of a DaTscan  
 20 performed on Mr. Brockman, which showed irrevocable damage to critical neurons responsible  
 21 for producing dopamine—a visible, measurable marker for dementia caused by Parkinson's  
 22 disease or Lewy body dementia.<sup>1</sup> Keneally Decl. ¶ 28, Ex. J at 1–2, 7, Ex. P at 1.<sup>2</sup> Defense  
 23 counsel asked that the government interview the doctors, with a pledge that the defense would not

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24       <sup>1</sup> A DaTscan is "the first and only FDA-approved aid in differentiating a relatively benign condition,  
 25 essential tremor, from Parkinsonian syndromes (PS)." [https://www.cedars-sinai.org/programs/imaging-](https://www.cedars-sinai.org/programs/imaging-center/exams/nuclear-medicine/datscan.html)  
 26 [center/exams/nuclear-medicine/datscan.html](https://www.hopkinsmedicine.org/health/conditions-and-diseases/dementia/dementia-with-lewy-bodies) (last visited Dec. 17, 2020); *see also*  
<https://www.hopkinsmedicine.org/health/conditions-and-diseases/dementia/dementia-with-lewy-bodies> (last visited Dec. 18, 2020) (summarizing relationship between damage to dopamine transmitters and Parkinson's disease and Lewy body dementia).

27       <sup>2</sup> "Keneally Decl." refers to the Declaration of Kathryn Keneally, affirmed December 8, 2020 and submitted  
 28 in support of the Motion. ECF No. 64-1.

1 participate, either by preparing the witnesses in advance or attending the interviews, and provided  
 2 waivers pursuant to the Health Insurance Portability and Accountability Act (“HIPAA waivers”)  
 3 to allow full access to Mr. Brockman’s medical information. Keneally Decl. ¶ 28. Defense  
 4 counsel also offered to make Mr. Brockman available for examination by medical experts of the  
 5 government’s choosing. Keneally Decl. ¶ 28.

6 Despite having access to all of this information, and the proffer of full cooperation from  
 7 defense counsel, the government has never—not before Indictment and not now—identified any  
 8 expert to conduct an independent examination of Mr. Brockman. Instead, citing no medical or  
 9 legal basis for its position, the government now makes the stunning request that the Court invoke  
 10 discretionary authority to ““commit [Mr. Brockman] to be examined for a reasonable period, but  
 11 not to exceed thirty days”” for observation by “trained Bureau of Prisons mental health  
 12 professionals and staff.” Gov’t Resp. at 2–3 (quoting 18 U.S.C. § 4247(b)); 18 U.S.C. § 4241(b).

13 The law is to the contrary. Due process mandates that a defendant be deprived of his  
 14 liberty only if the government establishes “compelling governmental interests” that cannot be  
 15 served by outpatient evaluation.<sup>3</sup> *United States v. Neal*, 679 F.3d 737, 741 (8th Cir. 2012); *see also United States v. Deters*, 143 F.3d 577, 582–84 (10th Cir. 1998) (explaining due process  
 16 limits on custodial competency examination); *In re Newchurch*, 807 F.2d 404, 408–  
 17 09 (5th Cir. 1986) (same). Such compelling interests must be substantiated by specific evidence  
 18 and findings of fact following a hearing. *Neal*, 679 F.3d at 741–42; *Deters*, 143 F.3d at 582–84;  
 19 *see also United States v. Song*, 530 F. App’x 255, 260–61 (4th Cir. 2013). The generalized  
 20 conclusion that ““an in-custody evaluation is likely to be more comprehensive than an out-of-  
 21 custody evaluation’ . . . is not sufficient to demonstrate the necessity of a custodial examination.””  
 22 *United States v. Parks*, 2018 WL 2090821, \*4 (W.D. Ky. May 4, 2018) (quoting *United States v. Krauth*, 2010 WL 428969, at \*5 (N.D. Iowa Feb. 2, 2010)).

23 These prosecutors’ desire to have Mr. Brockman remanded also contradicts Department of

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 26       <sup>3</sup> Due process safeguards also make orders remanding defendants for custodial evaluation under § 4241(b)  
 27 subject to immediate appeal. *See, e.g., United States v. Deters*, 143 F.3d 577, 581 (10th Cir. 1998) (holding  
 28 commitment under § 4241(b) is immediately appealable); *United States v. Davis*, 93 F.3d 1286, 1288–  
 89 (6th Cir. 1996) (same, reversing commitment order); *United States v. Neal*, 679 F.3d 737, 740 (8th Cir. 2012)  
 (vacating and remanding § 4241(b) commitment order on interlocutory appeal).

1 Justice policy. “Since the requirements of these provisions stretch the Bureau of Prison’s mental  
 2 health resources to their limits, incompetency (Section 4241) and insanity (Section 4242) studies  
 3 should, wherever possible, be done in the community by local psychologists/psychiatrists, with  
 4 commitments to the custody of the Attorney General being reserved for those individuals who  
 5 cannot safely be examined in the community.” U.S. Dep’t of Justice, Just. Manual, Organization  
 6 and Functions Manual § 8, *available at* <https://www.justice.gov/jm/organization-and-functions-manual-8-bureau-prisons> (last visited Dec. 21, 2020).

8 The government’s assertion here that “[a] custodial placement is appropriate in cases  
 9 where malingering is a concern,” Gov’t Resp. at 2, is equally unsupported and insufficient. To  
 10 the contrary, courts routinely accept non-custodial evaluations that include built-in testing to  
 11 address malingering. *See United States v. Buckingham*, 2020 WL 7238273, \*2–3, 10–  
 12 12 (N.D. Ala. Dec. 9, 2020) (finding defendant incompetent based on outpatient evaluations that  
 13 included conclusion that defendant was not malingering); *United States v. Hernandez*,  
 14 2018 WL 2738880, \*8–15 (N.D. Ohio June 7, 2018) (finding outpatient evaluator’s conclusion  
 15 that defendant was not malingering more reliable than custodial evaluator’s conclusion that  
 16 defendant was malingering). Dr. York’s forensic testing of Mr. Brockman included these  
 17 safeguards, Keneally Decl. Ex. O at 4, 7, Ex. R. at 5, 7, and the government nowhere addresses  
 18 why an independent expert cannot meet this standard in a non-custodial setting.

19 There is no reason, much less a compelling reason, for Mr. Brockman to be subjected to  
 20 custodial examination prior to the competency hearing. First, and “[m]ost importantly,”  
 21 Mr. Brockman “is currently on pretrial release,” and “should not lose his freedom simply by  
 22 raising the issue” of competence. *Parks*, 2018 WL 2090821, at \*5. Nor is there any reason to  
 23 believe that a custodial evaluation could be completed more quickly than an outpatient  
 24 examination. *See Krauth*, 2010 WL 428969, at \*4 n.4 (noting that it is “more likely that an in-  
 25 custody examination would take longer”).

26 Further, in the midst of the COVID-19 pandemic the risk to Mr. Brockman’s health far  
 27 outweighs any “benefit” of incarceration. As a 79 year-old cancer survivor with a heart condition  
 28 as well as progressive dementia, remanding Mr. Brockman to the custody of the Bureau of

1 Prisons would dramatically increase his risk of contracting the disease. *See* Keneally Decl. Ex. G  
 2 at ¶ 9; *see also* <https://www.bop.gov/coronavirus/> (last visited Dec. 17, 2020) (reporting that  
 3 nearly a quarter of all federal inmates have been diagnosed with COVID-19 over the course of the  
 4 pandemic).

5 The defense submits, instead, that the court-ordered examination of Mr. Brockman should  
 6 occur on an out-patient basis near his home in Houston, the fourth-largest city in the United  
 7 States, with over 18,000 licensed physicians.<sup>4</sup> Houston's Texas Medical Center is the largest  
 8 medical facility in the world, and its hospitals have reliably been ranked among the nation's best.<sup>5</sup>  
 9 Surely "the United States can locate, within a driving distance of [Mr. Brockman's] home that  
 10 would allow him to travel to and from the appointment each day, a qualified psychologist or  
 11 psychiatrist to conduct the forensic examination." *Parks*, 2018 WL 2090821, at \*5. There is  
 12 nothing to be gained, and considerable risk, by requiring Mr. Brockman to travel to a distant  
 13 location, much less to be incarcerated.

14 **III. THE GOVERNMENT'S CONCESSION THAT A HEARING IS REQUIRED  
 15 SUPPORTS THE DEFENSE'S MOTION FOR TRANSFER**

16 The government conceded for the first time that a competency hearing is necessary in its  
 17 Response filed on the evening of December 15, 2020, following a hearing *on that same day*  
 18 before this Court on the defense's Motion to Dismiss in Part for Lack of Venue and to Transfer to  
 19 the Southern District of Texas (the "Transfer Motion"), ECF No. 49. The defense set out, as one  
 20 of many grounds supporting transfer, that a competency hearing should be held in the Southern  
 21 District of Texas, where Mr. Brockman resides and where all of his doctors practice.<sup>6</sup> Transfer

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22 <sup>4</sup> <https://www.houston.org/houston-data/health-care-houston> (last visited Dec. 20, 2020).

23 <sup>5</sup> <https://www.tmc.edu/news/2019/07/seven-tmc-institutions-ranked-as-best-hospitals-by-u-s-news-world-report/> (last visited Dec. 20, 2020).

24 <sup>6</sup> In opposing the Transfer Motion, the government argued that venue should not be determined by the  
 25 location of the defense's "experts." Gov't Opp'n to the Mot. to Dismiss in Part for Lack of Venue and to Transfer to  
 26 the Southern District of Texas at 9, 12, ECF No. 63. The doctors whose medical reports were included in support of  
 27 the instant Motion are not, as the government depicts, experts "retained" by the defense. *See* Gov't Resp. at 2. While  
 28 the defense will present them for their expertise, they are third-party witnesses. Each doctor examined  
 Mr. Brockman for diagnostic and treatment purposes. Keneally Decl. Ex. G at ¶ 4, Ex. H, Ex. I, Ex. J, Ex. K. Even  
 Dr. York, a neuropsychologist, who performed subsequent forensic testing at the request of defense counsel,  
 examined Mr. Brockman in the first instance in response to a referral by his personal doctor to determine a diagnosis  
 and course of treatment. Keneally Decl. Ex. G at ¶ 4.

1 Mot. at 11–13; *see also* Reply in Supp. of Transfer Mot. at 9–10, ECF No. 66. The government’s  
 2 conspicuous silence concerning its decision to concede the need for a competency hearing before  
 3 or during the argument on the Transfer Motion is particularly telling: this concession greatly  
 4 undercuts the government’s opposition to the Transfer Motion.<sup>7</sup>

5 **IV. THE BALANCE OF THE GOVERNMENT’S “RESPONSE” HAS NO BEARING  
 6 ON THE ISSUES ON THIS MOTION**

7 Given its concession on the only issue raised by the Motion, the government captions its  
 8 current submission not as an “Opposition,” but as a “Response,” which it then uses to  
 9 mischaracterize the defense’s position and to “preview” its “skepticism” about the defense’s  
 10 medical evidence.

11 Having “spurned” the defense offer of a cooperative approach at each step so as to force  
 12 this adversarial proceeding,<sup>8</sup> the government now adds gratuitous but bogus complaints that the  
 13 defense is “hiding relevant evidence.” Gov’t Resp. at 3, 6. In addition to the unilateral discovery  
 14 provided so far, the defense previously stated its support for “an independent expert selected by  
 15 the court, asking only that the examination take place proximate to Mr. Brockman’s home in  
 16 Houston,” and acknowledged the government’s right to cross-examine the doctors and other  
 17 witnesses and present its evidence. Def.’s Mot. at 19.

18 While ignoring the medical evidence, the government propounds a layman’s analysis as to  
 19 what may be relevant to a competency determination. Thus the government unloads for seven  
 20 pages in its “Response” and 536 pages of exhibits, “the government’s skepticism [that] will be  
 21 further developed throughout these competency proceedings” because “it is worth orienting the  
 22 Court to some of them at the outset.” *See* Gov’t Resp. at 4–11.

23 The government’s “skepticism” is distorted, misleading, and at times flatly incorrect on  
 24 the face of its own “evidence.” It is also premature and not germane to the sole issue before this

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25       <sup>7</sup> In its groundless contention that Mr. Brockman be remanded for custodial examination, the government  
 26 references a facility in Fort Worth, Texas, implicitly acknowledging that Texas, where Mr. Brockman resides, is  
 27 where his medical issues should be addressed. Gov’t Resp. at 2–3.

28       <sup>8</sup> The Court: “is it true that they [the defense] offered to let you [the government] talk to the medical people  
 without even the defense being there and you spurned that opportunity?” AUSA Pitman: “That is true, Your  
 Honor.” Dec. 15, 2020 Hr’g Tr. at 33:1–33:4.

1 Court that the government has now conceded in its Response—a competency hearing is necessary  
 2 in this matter. It is sufficient for present purposes to note that the accurate facts will be presented,  
 3 and the government’s version rigorously disputed—in the full evidentiary presentation at the  
 4 hearing. Now that the government has dropped its strategic opposition to that hearing, the parties  
 5 and the Court can get on with the proceeding guaranteed to Mr. Brockman by due process.

6 **V. THE GOVERNMENT IS WRONG THAT IT WOULD HAVE BEEN  
 7 INAPPROPRIATE TO EVALUATE THIS ISSUE PRE-INDICTMENT**

8 The government’s final point in its Response is an attempt to assert that it would have  
 9 been “inappropriate” for the government to consider Mr. Brockman’s competency pre-indictment.  
 10 Gov’t Resp. at 11.

11 It is the essence of a prosecutor’s job to review all of the circumstances of the  
 12 government’s investigation when making a decision to indict. *See U.S. Dep’t of Justice, Just.*  
 13 *Manual § 9-27.110 & Comment; see also § 9-27.220, available at https://www.justice.gov/jm/jm-*  
 14 *9-27000-principles-federal-prosecution* (last visited Dec. 21, 2020). The Department of Justice  
 15 has made clear that this fundamental responsibility extends to the consideration of an individual’s  
 16 health and competency: the United States Justice Manual provides that a “person’s personal  
 17 circumstances” should be considered in determining whether there is a substantial federal interest  
 18 supporting prosecution. *U.S. Dep’t of Justice, Just. Manual § 9-27.230, see also § 9-27.220.*  
 19 Circumstances particular to the accused which “may suggest that prosecution is not the most  
 20 appropriate response” include “advanced age, or mental or physical impairment.” *U.S. Dep’t of*  
 21 *Justice, Just. Manual § 9-27.230, Comment 7; see also United States v. Lovasco*, 431 U.S. 783,  
 22 795 (1977) (“Rather than deviating from elementary standards of ‘fair play and decency,’ a  
 23 prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he  
 24 should prosecute and will be able promptly to establish guilt beyond a reasonable doubt.”). Thus  
 25 the government’s contention that it is only for “the Courts, not prosecutors, to make competency  
 26 determinations[,]” Gov’t Resp. at 11, fails in the face of the Department’s express policy.

27 The government has conceded at least this much: Mr. Brockman is entitled to have the  
 28 issue of his competency addressed before this prosecution may proceed. Given the government’s

1 abdication of a pre-indictment review of the evidence, the issue is now squarely for a court to  
 2 decide.

3 **VI. CONCLUSION**

4 The central issue for the hearing is Mr. Brockman's fundamental right to present a  
 5 defense. A defendant who "lacks the capacity to understand the nature and object of the  
 6 proceedings against him, to consult with counsel, and to assist in preparing his defense may not  
 7 be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This principle is embodied  
 8 in 18 U.S.C. § 4241(a).

9 Now that the government has dropped its opposition, the parties agree that a court should  
 10 hold a hearing under 18 U.S.C. § 4241 to determine whether he lacks the capacity to assist in his  
 11 defense. The defense is scheduled to meet and confer with the government on December 22, and  
 12 will propose to the Court appropriate, reciprocal discovery of evidence relevant to competency  
 13 and proposed for admission at a hearing, the sequence and timing of further examinations of  
 14 Mr. Brockman, a proposed schedule for the hearing and other proceedings, and other issues  
 15 relevant to competency proceedings. The defense continues to believe that the competency  
 16 proceeding should take place in the Southern District of Texas, for the reasons stated in support of  
 17 the Transfer Motion.

18  
 19 Dated: December 21, 2020

Respectfully submitted,

20 Jones Day

21  
 22 s/ Neal J. Stephens  
 23 NEAL J. STEPHENS

24 Counsel for Defendant  
 25 ROBERT T. BROCKMAN